

1992

Glen P. Willey v. Rosalind Ann Johnson Willey : Brief of Appellant

Utah Court of Appeals

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GLEN P. WILLEY,

Plaintiff/Appellee,

vs.

ROSALIND ANN JOHNSON WILLEY,

Defendant/Appellant.

Case No. 920091CA

District Court
No. D91-490-0101
Category No. 14B

Priority No. 16

BRIEF OF APPELLANT
ROSALIND ANN JOHNSON WILLEY

Appeal From a Final Decree of Divorce Entered by
Third Judicial District Court for Salt Lake County,
State of Utah

Honorable David S. Young, District Judge

UTAH COURT OF APPEALS

BRIEF

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AUG 17 1992

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Clerk of the Court

IN THE UTAH COURT OF APPEALS

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)	
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JURISDICTION

This is an appeal from a final Decree of Divorce entered in the Third Judicial District Court of Salt Lake County, State of Utah on January 14, 1992. The Utah Court of Appeals has jurisdiction of this appeal pursuant to Rules 3 and 4, Rules of the Utah Court of Appeals and Utah Code Ann. § 78-2a-3(2)(g) (Supplement 1989).

STATEMENT OF ISSUES PRESENTED FOR REVIEW

1. Whether the Court abused its discretion by awarding defendant alimony in the sum of \$1,500.00 per month for the first twelve months from the date of trial and \$1,000.00 per month for three years thereafter, in light of the disparity of income between the parties, the length of marriage, defendant's age, lack of specified job training or skills, her financial needs and economic obligations, including the care of her own children.

2. Whether the Court misinterpreted or misapplied the law as set forth in Howell v. Howell, 806 P.2d 1209 (Utah App. 1991) in failing to equalize the parties' standard of living or opportunities.

3. Whether the Court abused its discretion in not allowing defendant to present evidence of her economic needs and circumstances arising from the primary care of her children from a prior marriage and in failing to make findings of fact related to the defendant's financial needs.

4. Whether the Court abused its discretion by ordering defendant to be responsible for one-half of substantial marital debts and obligations in light of a significant disparity between plaintiff and defendant's ability to earn income and to pay or satisfy such obligations.

5. Whether the Court abused its discretion by failing to provide defendant an award or any other consideration for her premarital equity and in failing to adhere to legal standards related to the recognition of premarital contributions.

6. Whether the Court abused its discretion in failing to award defendant a significant contribution towards reasonable attorney's fees and court costs in light of the defendant's inability to pay and the extreme disparity of income between plaintiff and defendant.

STATUTORY AUTHORITY

Utah Code Annotated §30-3-5(1) (1989).

DISPOSITION OF PROPERTY - MAINTENANCE OF HEALTH CARE OF PARTIES AND CHILDREN - COURT TO HAVE CONTINUING JURISDICTION - CUSTODY AND VISITATION - TERMINATION OF ALIMONY - NON-MERITORIOUS PETITION FOR MODIFICATION.

1. When a Decree of Divorce is rendered, the Court may include in it equitable orders relating to the children, property, and parties

STATEMENT OF THE CASE

Glen Paul Willey, the plaintiff-appellee in this matter, filed a Complaint for divorce against his wife, Rosalind Ann Willey, on January 8, 1991. Mrs. Willey subsequently filed a counterclaim seeking alimony, a fair and equitable division of

property, recognition of a premarital contribution and attorney's fees.

The case was tried before the Honorable David S. Young on November 21 and 22, 1991. Each side was represented by counsel and presented documentary and testimonial evidence. In addition, Mr. Willey called as a witness, the Appellant's employer who presented evidence related to her rate of pay and lack of benefits. Mrs. Willey called as witnesses a vocational management expert, her brother-in-law and her counsel. Following presentation of the evidence and closing arguments, the trial court issued its ruling. Thereafter Findings of Fact Conclusions of Law and Decree of Divorce were signed and entered on January 14, 1992.

The rulings of the trial court applicable to the issues on appeal were as follows:

1. Defendant was awarded alimony in the amount of \$1,500.00 per month for a period of twelve months from the date of trial. Thereafter, alimony was reduced to \$1,000.00 per month for three years, at which time alimony would terminate.

2. The Court ordered that the parties' home be sold and after deducting the costs of sale and all liens, the parties were to be equally responsible for any remaining deficiencies or share the remaining equity.

3. The Court ordered the parties to share equal responsibility for the payment of plaintiff's loan with First Interstate Bank in the approximate amount of \$11,600.00.

4. The Court denied defendant's request for a consideration of premarital contribution holding that plaintiff's premarital property had been co-mingled in subsequent purchases of marital residence.

5. Finally, the Court found that Appellant was capable of earning between \$1,500 and \$2,000 per month, but failed to adopt any findings related to her needs or expenses. The Court further found that appellee could earn \$110,000 per year.

Copies of the Findings of Fact, Conclusions of Law and Decree of Divorce are attached hereto in the Addendum as Exhibits A and B and are, by this reference, incorporated herein.

Defendant timely filed a notice of appeal on February 5, 1992.

STATEMENT OF FACTS

I. Marital History.

The parties were married on April 29, 1982 in Salt Lake City, Utah; each had been married before. Defendant, now age 42, had custody of three minor children from a prior marriage, two of whom remained minors as of the date of divorce. Defendant owned her own home with equity of \$29,000, her household furnishings, an automobile and gifted stocks; prior to her marriage, she was employed full-time in retail clothing earning approximately \$10,000 per year. (TR 9 and 212).

Plaintiff, then age 31, had just begun working as a stockbroker at Kidder Peabody after having been out of work for a

number of months. He brought to the marriage an automobile and minor personal possessions. (TR 212). During the marriage, Mr. Willey's income and success as a stockbroker grew quickly (Exhibit 34 D) allowing Mrs. Willey to work part-time through 1985 and then only sparingly "as a hobbyist" until the plaintiff announced in October 1990 he no longer desired the marriage to continue.

II. Employment History.

From 1982 through the trial date in 1991, plaintiff remained employed as a stockbroker with Kidder Peabody earning the following amounts of money in the last six years of the marriage:

1986	\$120,087.44
1987	138,052.25
1988	116,640.41
1989	73,095.60
1990	98,091.68
1991	126,095.62 ¹

As a financial planning device, plaintiff deferred income over \$125,000 in any calendar year. The trial court found, for purposes of fixing alimony, that since appellee's income was "variable" from year to year, he could be expected to earn income of \$110,000 per year, a "conservative" average (Decision, p.8). In addition, plaintiff received a benefit package of health, accident, life, vacation and other benefits

¹Year to date to November 1, 1991.

worth \$12,200 per year together with travel allowances and potential bonuses.²

Mrs. Willey worked part-time from 1983 through 1990 earning the following:

1983	\$ 4,810
1984	5,011
1985	6,871
1986	1,556
1987	1,323
1988	470
1989	0
1990	4,410

Mrs. Willey became a full-time homemaker and mother until the separation required her to return to full-time work in 1991. In 1990, Mrs. Willey became employed as a salesperson at A Women's Place Bookstore earning \$5.00 per hour. She supplemented her income by leading literary groups formed through her bookstore. Mrs. Willey's average income for all years worked was not greater than \$2,809 (Exhibit 34 D) and her gross monthly income at the time of trial from all sources was \$860. Mrs. Willey also received \$332 as a contribution to child support for the care of her two minor children.

Both parties have college educations. Mrs. Willey, however, has had no vocational training other than her part-time clothing or book sales jobs, and has no skills which would allow her to effectively compete in the current job market. Accordingly, she requested rehabilitative alimony to allow her to

²Bonus for 1987, receivable in 1992 was \$14,212; bonus for 1990 receivable on January 2, 1995 was \$11,003; bonus projected for 1991 receivable in 1996 was \$16,219 (TR at 151).

update her educational and vocational skills.

Ellen Richardson, a vocational expert, testified that Mrs. Willey's "degree" is old and she has no relevant market experience in the interim.

The years between 20 and 30 are profitable. Obviously, between 30 and 40 those are pretty critical years in a women's career. She has not been doing anything professional during that period of time to enhance skills. (TR 129).

Mrs. Richardson's recommendation was that Mrs. Willey pursue "education full-time, that she not try to marry that with working full-time and getting that on the side. That simply compounds the time it takes and she is short on time." (TR 130) Based upon Mrs. Richardson's testimony, it was her opinion that Mrs. Willey if not allowed educational rehabilitation, would be "battling with a welfare situation". (TR 131).

In spite of this testimony, the court entered a specific finding related to defendant's earning ability:

12. . . . the court further finds that defendant is capable of earning an income of between \$1,500 and \$2,000 per month based on her education and qualifications. (R. at 138).

Marital Home

Appellant owned her own home on Logan Avenue prior to the parties' marriage with equity of \$29,163.73. That home was sold in April 1983 when the parties purchased Appellant's grandmother's house on Lynnwood Drive for \$92,700, using her premarital equity and additional monies borrowed from Appellant's parents for home improvements. The Lynnwood Drive home was then sold in May 1986 for \$130,000 leaving equity of \$59,645, all of

which was used as a down payment on the purchase of the parties' present home on Maywood Drive.

According to Appellant's testimony, Mr. Willey always regarded Mrs. Willey's equity as her separate property and assured her that he would not and did not treat the original equity as a marital contribution. (TR 213-214)

In 1989 at Mr. Willey's request, a second trust deed was executed as security for earlier borrowings from Mrs. Willey's parents (the Johnson's), for home improvements on the Lynnwood Drive home as well as some \$25,000 borrowed to pay for the purchase of Mr. Willey's 450 SEL Mercedes. In order to deduct the interest payments on his tax returns, the note was secured by a deed of trust against the parties' Maywood Drive house.

Appellant argued that the second note dated March 1, 1987 for \$25,000 should be considered as a separate marital obligation which Mr. Willey ought to pay, thus allowing appellant enough proceeds from the eventual sale of the Maywood Drive home to reimburse her for her original premarital investment. The District Court held that Appellant's subsequent uses of her premarital equity constituted a co-mingling of her assets and, after holding that both notes be deducted from the sale proceeds, since there likely would be no equity after the sale of the home, it denied her claim for a premarital distribution. (TR at 8).

Appellant's Health

Appellant had surgery in September 1991 for the removal of a fibrotic tumor in her uterus. She lost a full two months work as a result of that operation and was just returning to pre-surgery health at the time of trial. Appellant testified based upon her knowledge of her medical condition, that due to the existence of such tumors, she must have continued medical check-ups and tests and may be more susceptible to such growths because of her predisposition. Appellant is 42 years of age, but is not covered by any other health insurance plan. In order to continue COBRA coverage under Mr. Willey's health plan, she must pay \$560 per month together with significant family and individual deductibles and co-payments.

Mr. Willey, on the other hand, receives the benefits of a fully-paid health insurance program together with a \$3,000 per year cafeteria plan which offsets any out-of-pocket co-payments, tax free.

SUPPORT AND STANDARD OF LIVING

During the marriage, the parties enjoyed a comfortable to high standard of living, taking annual vacations, driving expensive automobiles, giving and participating in frequent social engagements, purchasing and wearing expensive clothing and providing private schooling for Mrs. Willey's children. In addition, Mr. Willey enjoyed personal, mental and physical counseling and grooming. The parties generally spent what they made, however, plaintiff was always careful to save significant

amounts of money should trading in the stock market produce lean times. At one time in 1987, Mr. Willey testified he had over \$100,000 in the bank from numerous sources. (TR 202)

In 1989, Mr. Willey experienced a comparatively bad year of production. That caused marital trouble and some financial stress, however, not so much that Mr. Willey changed much of his standard of living. He continued to spend over \$200 per month on a personal body trainer and enjoyed European and personal trips. (TR 272).

Following their separation in November 1990, the parties agreed and the trial court approved a Temporary Order of Support requiring plaintiff to maintain all of the parties' debts and obligations including the first mortgage on the home of approximately \$2,600; and, in addition, to pay Mrs. Willey \$1,500 per month as temporary support. The parties attempted to treat this distribution tax-free to Mrs. Willey by filing joint income tax returns. (TR 147)

ARGUMENT I

THE COURT ABUSED ITS DISCRETION IN LIMITING APPELLANT'S AMOUNT AND DURATION OF ALIMONY.

The trial court employed the wrong standard to set alimony and failed to consider or properly apply necessary factors judicially recognized in analyzing an alimony award.

Those considerations are commonly recited from Jones v. Jones, 700 P.2d 1072, 1075 (Utah 1985) as follows:

(1) the financial conditions and needs of the recipient spouse; (2) the ability of the recipient spouse to produce sufficient income to support herself; and (3)

the ability of the paying spouse to provide that support.

Failure to consider each factor in analyzing an alimony award, constitutes an abuse of discretion, Bell v. Bell, 810 P.2d 489 (Utah App. 1991), unless the record otherwise produces clear and convincing evidence which allows the court to apply these factors as a matter of law. Asper v. Asper, 753 P.2d 978, 981 (Utah Court of Appeals 1988).

Appellant argues that the trial court below committed error and abused its discretion in analyzing each of the Jones factors.

A. Financial Condition and Needs

While the Court expressed concern for the Appellee's expenses, it failed to make findings related to either party's needs. Appellant claims expenses prior to the ordered sale of their marital residence of \$6,905 per month and after sale of their home of \$5,405 (see Exhibit 27 D), the difference being a reduction of mortgage payments from \$2,600 per month to \$1,100 in rent.

The Court would not consider the wife's obligation to her natural children or any expenses associated with their care, in considering appellant's overall needs.

During the parties' one year separation, Appellee paid

the following obligations for his wife's support under the temporary order of support:

Mortgage	\$2,492
Marital installment obligations	360 ³
Support payments	<u>1,500</u>
Total monthly temporary support	\$4,352

The District Court's final order continued Appellant's support at \$1,500 per month for only one year but failed to consider the following additional obligations which Appellant will be required to pay and satisfy:

1. Rent of \$1,100 per month to replace shelter when the parties' home is sold;

2. Health insurance after the date of the Decree of Divorce in the amount of \$560 per month (TR at 169);

3. Obligations imposed upon Appellant by the Decree of Divorce to pay one-half of the marital debt which includes an approximate \$11,000 debt to First Interstate Bank payable at \$360 per month and whatever deficiency maybe due on the notes to Mrs. Johnson following the sale of the parties' residence.⁴

³The parties' promissory note payment to Mrs. Johnson in the amount of \$870.52 was deferred pending sale of home. Since the date of trial, the parties house was sold by order of the trial court, which sale will produce an approximate \$37,000 deficiency, one-half of which appellant must pay under the Decree of Divorce.

⁴The amount due as of November 1, 1991 on both notes secured by a second trust deed on the home totalled \$80,759.90 (Ex. 15 D). The parties continue to owe monthly payments of \$870.52 and have missed nine payments since the date of trial to July, 1992 totalling \$7,834.68 together with interest thereon at an agreed 12%. The home sold for approximately \$305,000 producing a deficiency of \$36,944 calculated as follows:

4. Taxes associated with Appellant's receipt of alimony.

Not only did Appellant lose the benefits of her mortgage and marital debt being paid, she was ordered to pay more in obligations than the \$1,500 per month alimony would support. She went from monthly support of \$4,352 to support of \$1,500 with additional obligations of \$1,680,⁵ for a total loss of pre-Decree support of \$6,032!

The needs of the Appellant are to be measured by the standard of living enjoyed during the marriage together with the parties' living standard during the course of separation. Howell v. Howell, 806 P.2d 1209 (Utah App. 1991). Clearly, both parties experienced a high standard of living during the marriage which allowed luxurious housing in a home costing in excess of \$300,000, expensive automobiles (Appellant drove a 1987 Jeep Wagoneer and Appellee a 1987 450 SEL Mercedes Benz); family vacations, clothing, opportunity to give and participate in social gatherings, private schooling for appellant's children and

House sale	\$305,000.00)
Less: cost of sale (7%)	(21,350.00)
first mortgage	(232,000.00)
notes secured by deed	<u>(88,594.58)</u>
Net balance(loss)	(\$36,944.58)

⁵Rent \$610; health insurance \$560; one-half First Interstate Bank \$180; taxes on \$1,500 support at 22% equals \$330; total added obligations \$1,680.

all of the trappings of people enjoying a high standard of living and station in the community.

The parties funded this high standard of living through their earnings (Exhibit 34 D), and maintained it during periods of income fluctuation through credit made available from the Appellant's parents, borrowings from the parties' 401(k) programs, the appellee's employer, banks and other readily available sources. While the parties incurred debt in order to maintain this lifestyle, the debt incurred was certainly within their capacity to pay and was voluntarily incurred by Mr. Willey.

Subsequent to the filing of the Complaint for Divorce, Appellant was able to maintain a reduced but comfortable standard of living; she continued to reside in the parties' home, had use of \$1,500 per month non-taxable support, and remained a dependant under her husband's health insurance program. Her children were not able to continue in private schools, and she was not able to continue her schooling, take vacations, purchase expensive clothing or live to the standard previously enjoyed.

After the District Court's final award of alimony, and after the sale of the parties' residence, she will have available to her, now subject to tax, her child support of \$330 per month, her net earnings of \$664 (Ex. 370) and the ordered alimony. However, she will also have additional debt burden of \$24,000, and the extra need to fund rent, taxes and health insurance. All

of these additional burdens will reduce her comparable resources from \$5,346 to \$324 per month.⁶

B. Ability of Spouse to Provide For Her Own Support.

In spite of testimony that Appellant had not worked full-time in competitive employment for the nine years of marriage and was averaging only \$628 gross per month from her two jobs (book sales and supplemental literature classes associated with the bookstore)(TR at 58) the Court found, based upon Appellant's education and circumstances, that she should be able to earn between \$1,500 and \$2,000 per month, recognizing it may take her "a little bit of time to get to that level", but "should be there within 12 to 24 months". (TR of Decision p.8).

Appellant called upon a vocational expert, the Human Relations Manager of Bonneville Corporation, who testified that a 42 year-old woman with an outdated Bachelor of Arts education who had not established marketable current skills and had not

6			
<u>Resources Before Divorce</u>		<u>Resources After Divorce</u>	
Mortgage	\$2,492		\$ 0
Debts	360		0
Support	1,500		1,500
Child Support	330		330
Earnings	664		664
	<u>\$5,346</u>		<u>\$2,494</u>
Reduced resources by added burdens:			
	Rent	1,100	
	Health Ins.	560	
	First Interstate	180	
	Deficiency (24,000)	?	
	Taxes	<u>330</u>	
			<u>\$2,170</u>
Net available:			
Before:	<u>\$5,346</u>	After:	<u>\$ 324</u>

maintained employment for ten years, needed rehabilitation in order to upgrade her skills and education, unless she is to be relegated to unskilled sales or other under-paid positions. The expert testified that without financial help, Appellant was likely to become a public charge. (TR at 127-131). The expert's testimony was subjected to cross-examination but not controverted by competent evidence. The testimony was, however, completely discredited by the Trial Judge upon the assumption that it was given by an "acquaintance" and was therefore manufactured, or because the expert had intended to charge for her services which the Court found to be "unfortunate". (TR at 145-146).⁷

The Court's finding that Appellant could earn between \$1,500 and \$2,000 per month is simply not consistent with her skills, her actual earnings, her abilities or the evidence and is based solely upon an assumption and speculation that as a "presentable woman" (TR 142) she is competent to obtain and maintain such employment⁸.

During the two years prior to the trial in this matter, Appellant worked three to four days per week at \$5.00 per hour and taught approximately five classes per month at nights earning an average of \$628 gross income. (TR at 58). In order to earn

⁷Appellant questions the trial court's reasoning, believing that many men have "acquaintances" in the business world whose testimony would not be discredited for that reason alone.

⁸Appellee's counsel in cross-examination of Appellant and her expert, attempted to demonstrate that Mrs. Willey could qualify as a teacher (\$18,000) or sell clothing at Nordstrom (apparently speculating without evidence that Nordstrom pays \$1,500 to \$2,000 per month).

the \$2,000 per month projected by the Trial Court Judge, she would have to increase her hourly wage from \$5.00 to \$12.50 per hour. Had she been able to work full-time at \$5.00 per hour, her actual earnings would have been \$800, less taxes, for net take-home pay of \$623.80. (TR at 62).

C. Ability of Paying Spouse to Provide Support.

The District Court found, albeit "conservatively" that Appellee had the financial ability to earn \$110,000 exclusive of other employment benefits paid him. (TR of decision at p.7). Appellant's actual earnings are set forth on Exhibit 34 D or plaintiff's Exhibit 3 P. The Court apparently made that calculation by averaging income over the full nine years of the marriage (TR 184-185) at approximately \$90,000 per year and by taking a six year average between 1987 and 1991 but only using a year-to-date figure of earned income in 1991 in the amount of \$126,000. The Court then averaged earnings by excluding the high year of 1986 in order to support an approximate average of \$110,000.

The actual amount of earned income reported to November 1, 1991 was \$126,095 for just the first ten months of that year. The trial Court expressed confidence that the difference between its finding of average earnings of \$110,000 and the actual ten month earning of \$126,000 is insignificant enough to avoid a finding of abuse of discretion by the Court of Appeals (TR 187). Yet, that difference of \$16,000 for 10 months and almost \$30,000

for annualized income represents more than full year's earned income which the Court found Appellant capable of earning.

It is uncontroverted that the court's average findings do not include an additional \$12,308 of benefits received by Mr. Willey, (TR 172) nor do they include the deferred bonus of up to 4% of his production (TR 153). Accordingly, Appellee has a significant income earning ability and the clear opportunity to earn substantially more.

Appellee testified that his own expenses, other than attorney's fees and installment obligations, were only \$2,600 per month. This included approximately \$800 per month for his leased 450 SEL Mercedes Benz automobile.

The Court's conservative finding of \$110,000 gross earnings would produce monthly income of \$9,166.66 per month subject to taxes. Assuming a 30% withholding for taxes, that still leaves net income available under the Court's own findings of \$6,416.20 per month. Following sale of the parties' residence, Appellee will be relieved of \$2,492 per month in house payments and will only be paying to Appellant \$1,500 in tax deductible alimony payments, leaving him at least \$5,000 to support his \$2,400 per month expenses with an additional savings of some \$2,500 per month. Clearly Appellee has the financial ability not only to pay the ordered support, but a significant amount more; he also has the ability to pay all of the parties' marital debts and obligations.

Appellant argued below that for similar reasons expressed by the Court of Appeals in Thronson v. Thronson, 810 P.2d 428 (Utah App. 1991), the trial court's use of average earnings over a long period of time, without giving substantial weight to actual earnings in the year of divorce constitutes an abuse of discretion.

An additional effect of the Court's findings will prohibit applicant from ever seeking adjustment of support based upon changed circumstances related to Appellee's income. §30-3-5(3) Utah Code (Ann. 1953 as amended) authorizes retained jurisdiction to modify support awards where a change of circumstance has occurred. When the Court, however, determines earnings by using a long-term average, the Appellant is deprived of a significant protection should the paying spouse's earnings significantly increase.

In February 1991, the parties had reached a stipulation regarding temporary support based upon Mr. Willey's then represented annual income of \$81,000 for 1990 and Appellant's income of \$500 per month (Ex. R 13). The Commissioner approved that stipulated support of \$1,500 per month (Ex. R 40) after argument by Appellee that he actually made \$92,000 of income (Ex. R 23). The trial court, in the final Decree, approved a substantially reduced support based upon average income of \$110,000 per year, inspite of the fact that actual earnings were projected for 1991 at \$140,000 per year. This variance between \$81,000 and \$140,000 per year constitutes a \$60,000 swing in

annualized earnings. One would think that would be sufficient to demonstrate a change of circumstance for future modifications.

For the reasons expressed herein, Appellant believes that the Court abused its discretion by using a "conservative" average, by not considering actual earnings, by failing to consider a substantial benefit package available to Appellee and not available to the Appellant, and by failing to consider substantial bonuses. Having made its decision on Appellee's earning power, the trial court seemed less than interested in any evidence demonstrating Mr. Willey's future earning capacity and opportunities. (TR at 195).

It is also clear that the trial court (1) failed to make findings of fact concerning the appellant's needs; (2) failed to make findings consistent with the evidence concerning her abilities to contribute to her own needs; and (3) failed to properly consider the Appellee's significant ability to generate substantial income.

ARGUMENT II

THE COURT MISAPPLIED THE STANDARD FOR AN AWARD OF ALIMONY

After examining the three Jones factors, the Utah Court of Appeals held that alimony be set as permitted to "approximate the parties' standard of living during the marriage as closely as possible". Howell v. Howell, 806 P.2d 1209 at 1212 (Utah App. 1991). Alimony need not be limited to provide for only basic needs, but should also consider the recipient spouses' station in life. Gramme v. Gramme, 587 P.2d 144, 147 (Utah 1978), Gardner

v. Gardner, 748 P.2d 1076 (Utah 1988). Rudman v. Rudman, 812 P.2d 73 (Utah App. 1991).

The factual situation presented in Howell v. Howell was relatively similar to that presented here. The court in Howell made specific findings as to the plaintiff's and defendant's gross incomes. It did not, however, make the required findings as to defendant's financial needs, although she testified to monthly expenses of approximately \$5,000. The court in Howell was presented with a woman in her 50's having spent most of her marriage raising and caring for the children of the marriage. The court stated that the wife's

likelihood of achieving significant salary levels in the future is slim. The alimony set by the court does not come close to equalizing the parties' standard of living as of the time of the divorce, but allows plaintiff a two to four times advantage. We, therefore, hold that the alimony amount set by the Court was clearly erroneous.

Id at 1213.

Appellant here argues that her situation is similar to that presented not only in Howell but also in Bell v. Bell, 810 P.2d 489 (Utah App. 1991). Both situations present a wife essentially dependent upon the significant earnings of her husband during the marriage; she earned little and essentially stayed at home raising children. While it is true that Appellant's children are not the natural children of Appellee, it cannot be ignored that Appellant faces the problem of maintaining and raising those children as best she can without the children or herself becoming a public charge. It is further true that Appellant is little equipped to compete for high paying jobs and

is advancing in age. The standard announced by the Court of Appeals in Howell was an attempt to equalize the parties' post-divorce status in order to better equip both parties to go forward with their separate lives with relatively equal odds.

The trial court in the matter stated, in discussing the Howell standard:

. . . if the Court of Appeals directed that that is the standard, then the Court would be inclined, would obviously have a compulsion, because of controlling authority, to follow that. In the five years that I've been on the bench I have found that almost no case will justify the equalizing of income. There are circumstances that just simply, and facts, that just simply compel one to deal otherwise, and that, as a motivator or as an objective, seems to me to be, perhaps, in an individual case, something that could be pursued, for instance, if people had been married for a long period of time and in their retirement years they determined to separate, then I could understand that potential. But when one is as these parties are, where there are approximately a quarter-century of productive years remaining, if not more, that is certainly not my reading of the law nor my desire. I don't think it is appropriate, and I don't think it is likely in this case. (TR at 381)

The case law appears to adopt differing standards of alimony based upon the abilities of the paying spouse. Where the parties cannot maintain the standard of living enjoyed by them during the marriage, then the minimum standard must be that amount which keeps the recipient spouse from becoming a public charge. English v. English, 565 P.2d 409, (Utah 1977). However, where the joint income of the paying and receiving spouse is sufficient to approximate their standard of living, the Court should attempt to set alimony in order to "equalize the parties' post-divorce status". While that may not mean equal distribution of available income, it must consider the recipient's overall

financial needs as well as her practical and actual ability to contribute to her own support, and the paying spouse's ability to finance that standard.

The duration of the marriage should not be a significant controlling factor once it is determined that alimony is appropriate. Appellant does not consider nine plus years of marriage short-term, especially where she provided marital services to Appellee during the "best years of her life". These are years which could have been devoted to full-time employment, and to creating an opportunity to earn significant income. Instead, the parties chose through their acts, deeds and specific requests to live for nine years in a marital relationship with Mrs. Willey assuming the more traditional role of homemaker and caretaker to her children. These were the same years when Appellee's income rose from an average of approximately \$57,000 during the first four years of marriage to well over \$110,000 during the latter six years of marriage.

It is difficult to tell what, if any, standards the Trial Court used in analyzing or setting alimony in this matter. The Court announced that it would not follow the standards set forth in Howell v. Howell; the Court failed to make findings related to the Appellant's financial needs; the Court would not consider Appellant's obligations towards her natural children, nor would it reduce income available for her own support by whatever amount was necessary to meet her legal obligations of support to her own children; the Court failed to consider how

Appellant would make up the deficiency of income over expenses, requiring Appellant to pay 50% of marital debts and obligations even though total income available for support was insufficient. Finally, the trial court denied Appellant's request for rehabilitative alimony. Peterson v. Peterson, 737 P.2d 237 (Utah App. 1987). In short, the Court's analysis and award of alimony constituted a clear abuse of discretion. Jones v. Jones, 700 P.2d 1072 (Utah 1985).

ARGUMENT III

THE COURT ABUSED ITS DISCRETION IN FAILING TO CONSIDER APPELLANT'S OBLIGATIONS TO HER NATURAL CHILDREN.

Section 78-45-4.1 Utah Code Annotated (1953 as Amended) clearly provides that a stepfather has an obligation to support his stepchildren during the course of a marriage and until that marriage is terminated by Decree of Divorce.

Yet our courts have not expressed how the natural parent's obligations toward her children are to be considered in analyzing her needs for purposes of setting alimony. Appellant's uncontroverted testimony is that she requires \$5,400 to meet her expenses including the expenses associated with the care of her natural children. She testifies that she receives \$330 per month in child support from the children's natural father. Appellee has no further obligation toward child support, but does and should have an obligation to continue his wife in that standard enjoyed by the parties during the marriage. To what extent the Court can employ a fiction to avoid consideration of Appellant's

legal obligation of support to her children, has not yet been clarified by our Courts.

Appellant argues that her obligations to her children must first be considered by reducing her earned income available for their support, and by recognizing her increased financial needs. Appellant does not argue that certain expenses separately associated with the care of the children be continued by Appellee, such as private tuition and certain entertainment expenses clearly associated with the children's individual needs. However, to the extent her housing requires more than a one-bedroom apartment because she is the custodian of two minor children, and to the extent that the law obligates Appellant to provide education, food, clothing and shelter to her children, those financial obligations must be recognized by the trial court in fixing an award of alimony to her.

ARGUMENT IV

THE COURT ABUSED ITS DISCRETION BY REQUIRING EQUAL APPELLANT TO SHARE RESPONSIBILITY FOR MARITAL DEBT.

For reasons expressed in Arguments I and II above, the trial court abused its discretion in dividing marital debt, because it failed to consider either the applicant's ability to pay such debt or the disparity between Appellant's and Appellee's ability to earn income or satisfy debt.

The court ordered Appellant to be equally responsible for \$11,000 of debt with First Interstate Bank in Mr. Willey's name, inspite of the fact that much of that debt was incurred by him subsequent to the parties' separation. (TR 194 and 307). The court further

obligated Appellant to pay one-half of any deficiency on the two promissory notes due and owing to Mrs. Johnson which notes had been secured by the marital home. That debt has since been established at approximately \$37,900. Appellant received little if any property settlement that could be used to offset her share of this substantial debt. She is technically and practicably insolvent. Just as the relative abilities of each spouse may be important to an equitable distribution of assets, so too, is it important to a division of debt. Noble v. Noble, 761 P.2d 1369 (Utah 1988).

Even Appellee suggested in his proposed resolution of this matter before the trial judge that he should be responsible for marital debt recognizing that she will never have the ability. (Ex. 49-P, TR 336).

For the reasons expressed in Arguments I and II above, it was error for the court to impose equal obligations where the parties' earning abilities are so substantially disproportionate.

ARGUMENT V

THE COURT ABUSED ITS DISCRETION AND COMMITTED ERROR IN FAILING TO PROVIDE APPELLANT CONSIDERATION FOR PREMARITAL ASSETS

Appellant entered into this marriage with a \$29,000 equity in her own home and the security of a good job. She leaves the marriage with no home, substantial debt and little ability to provide for her own support and maintenance. Appellee, on the other hand, began this marriage with no property

and a reasonable income. He leaves the marriage with substantial income and comparatively small debt burdens.

In this context, Appellant argued to the trial court that the court should recognize her premarital contribution in order to leave her some equity to provide for herself and her children. This would have been accomplished had the trial court recognized that one of the two promissory notes, subsequently secured by the parties' marital home, be considered the separate obligation of Mr. Willey, since most of the proceeds were used for the purchase of his Mercedes automobile and since he, not she, has the ability to pay and satisfy such notes. This analysis would have left some equity after the sale of the parties' home with which to provide Appellant a portion of her premarital equity. The trial court found that because Appellant allowed her equity to be used in the purchase of subsequent homes, she lost the premarital treatment of such contribution through co-mingling. The court, accordingly, denied her claim inspite of uncontroverted testimony that Mr. Willey had always treated her contribution as her own separate property, and inspite of her ability to trace her separate contribution in each of the subsequent home purchases made by the parties.

Finally, by holding that the two notes owing to Mrs. Johnson and secured by the home must be paid solely from proceeds of the home, Appellant lost the opportunity to claim any recognition for her separate premarital equity into this marriage.

Appellant contends that the court erred in apply Mortenson v. Mortenson, 760 P.2d 304 (Utah 1988) by simply holding that her consent to use her premarital equity in the subsequent purchases of homes automatically lost its treatment as separate property. The court could have and should have fashioned a remedy which recognized Appellant's separate contribution prior to a division of assets or debts. In Mortenson the court held that property separately acquired by one spouse, together with any appreciation or enhancement of its value, should be awarded to that spouse unless the property has been consumed or its identity lost through co-mingling or exchanges, or where the acquiring spouse has made a gift of an interest therein to the other spouse. 370 P.2d at 308. The fact that Appellant's equity in her premarital home was exchanged for equity in two other homes is not in and of itself a "co-mingling or an exchange" which would automatically cause a loss of its identity. She is simply exchanging her premarital equity in a home for subsequent premarital equities. To hold otherwise would essentially destroy any opportunity for parties to upgrade their living conditions during subsequent marriages; this would be an economic absurdity. Burt v. Burt, 799 P.2d 1166 (Utah App. 1990).

Appellant argues that the only legitimate question left is whether or not the equity was "consumed" such that there is nothing to distribute. It is Appellant's belief that the court would not consider her arguments to separately treat the Johnson

notes, not as debt against the home but as personal debt against Mr. Willey, since the court had already made a determination that she lost the identity of her separate property through co-mingling.

ARGUMENT VI

THE COURT ABUSED ITS DISCRETION IN FAILING TO AWARD APPELLANT ATTORNEY'S FEES IN THE AMOUNT REQUESTED.

It is clearly within the court's discretion to award fees based upon evidence of the financial need of the recipient spouse, the ability of the other spouse to pay and the reasonableness of the fees. Rashband v. Rashband, 752 P.2d 1331-1337 (Utah App. 1988). In order to permit review, however, courts are encouraged to make findings explaining the factors which they considered relevant to the award. Morgan v. Morgan, 795 P.2d 684, 688 (Utah App. 1990).

Once it has been established that the recipient spouse is entitled to fees, it has been held an abuse of discretion to award less than the claimed amount without some reasonable justification to the contrary. Haumont v. Haumont, 793 P.2d 421, 426 (Utah App. 1990); Bell v. Bell, 810 P.2d 489 (Utah 1991).

The only comment made by the trial court was that it was unfortunate that both parties had to expend substantial fees in order to complete the dissolution of their marriage. (TR of Decision at p.3). Nowhere did the court hold that fees charged the Appellant were unreasonable. Accordingly, Appellant should be entitled to an award for all fees claimed as well as an award

for attorney's fees incurred in this appeal. Bell v. Bell, 810 P.2d 489 (Utah App. 1991).

REQUESTED RELIEF AND CONCLUSION

Appellant received as a distribution of property in this matter her automobile, premarital gifted stock (which her husband had earlier placed into their I.R.A. account), one-half of a 401K plan with a net value of \$12,000 and furniture and personal property in her possession. She also received one-half of a vested bonus to be received January 2, 1992 in the approximate gross amount of \$8,000.

Neither the I.R.A. nor 401K awards are available to Appellant without incurring substantial tax payments and penalties. (TR 311). Appellant is left with debts, including unpaid attorney's fees of approximately \$38,000, without the earning capacity to repay any such amounts.

Appellant, on the other hand, received an equal amount of property and debts but has the earning capacity to satisfy all such debts and to begin to successfully pursue his future with substantial income and credit available to him. Clearly, these parties are nowhere close to an equalization of opportunity. Howell v. Howell, 806 P.2d 1209 (Utah App. 1991). Appellant faces bankruptcy while Appellee enjoys a strong financial future.

The court's division of assets, its failure to consider Appellant's premarital equity, its imposition of debts upon Appellant without the ability to pay, its failure to recognize the substantial disparity between the parties' earning

capacities, its imposition of reducing alimony, and its failure to consider substantial obligations which face Appellant upon the sale of her house, clearly demonstrate an abuse of discretion in this matter. Appellant requests that this court evaluate that evidence which was submitted and which stands uncontroverted as to Appellant's needs, and fashion its own remedy and specific guidelines for the trial court to follow in imposing a fair and equitable decree of divorce.

The Appellant is insolvent and without the ability to pay her debts and obligations. This, by definition, makes her a public charge. The trial court's division of debt and award of support fails to comply with the most elementary standard of alimony, to provide a minimum of necessities, basic needs, and to assure that Appellant does not become a public charge. Yet, the trial court failed to evaluate the parties' standard of living, including their customary or proper status in the community, in order to set alimony as permitted at the parties' standard of living during the marriage. Howell v. Howell, 806 P.2d 1209 at 1212 (Utah App. 1991).

Accordingly, Appellant prays that this court reverse and remand this matter with direction to retry the divorce, in full, with guidelines to fashion a remedy consistent with Utah

law and equitable considerations. Appellant also requests an award of attorney fees and costs incurred for this Appeal.


Respectfully submitted this 15th day of August 1992.

By _____
Roger D. Sandack (2856)
Attorney for Appellant
Rosalind Ann Johnson Willey

CERTIFICATE OF SERVICE

On the 15th day of August, 1992, true and correct
copies of the foregoing BRIEF OF APPELLANT was hand delivered to
the following:

Ellen Maycock, Esq.
KRUSE, LANDA & MAYCOCK
50 West 300 South, #800
Salt Lake City, UT 84101



16007

ADDENDUM

FILED DISTRICT COURT
Third Judicial District

JAN 14 1992

SALT LAKE COUNTY

By _____ Deputy Clerk

ELLEN MAYCOCK - 2131
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Attorneys for Plaintiff
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Salt Lake City, Utah 84101
Telephone: (801) 531-7090

IN THE THIRD JUDICIAL DISTRICT COURT
FOR SALT LAKE COUNTY, STATE OF UTAH

GLEN P. WILLEY,)	
Plaintiff,)	FINDINGS OF FACT AND
vs.)	CONCLUSIONS OF LAW
ROSALIND ANN JOHNSON WILLEY,)	
Defendant.)	Civil No. 91 490 0101
)	Judge David S. Young

The above-entitled matter came on for trial on November 21 and 22, 1991. Plaintiff was present and represented by his counsel, Ellen Maycock, and defendant was present and represented by her counsel, Roger Sandack. The court having heard testimony, received exhibits, heard the arguments of counsel, and being fully advised, now makes and enters the following:

Findings of Fact

1. Residence. Plaintiff and defendant were *bona fide* residents of Salt Lake County, Utah, for more than three months prior to the filing of this action.
2. Marriage. Plaintiff and defendant are husband and wife having been married on April 29, 1982, in Salt Lake County, Utah.

EXHIBIT "A"

3. Children. No children have been born as issue of this marriage, and none are expected.

4. Grounds for Divorce. During the marriage, irreconcilable differences have developed between the parties making continuation of their marriage impossible. Each party is entitled to a decree of divorce from the other party.

5. Real Property. During the marriage, the parties acquired a house and real property located at 2605 East Maywood Drive, Salt Lake City, Utah. The house should be sold as soon as feasible because it constitutes a substantial financial burden for the parties. The house should be listed at a price of \$350,000 with a new real estate agent to be agreed upon by the parties as soon as the present listing agreement expires. Upon sale of the house, the first mortgage in the approximate amount of \$232,000 to Zions Bank should be paid in full, and the second mortgage in the approximate amount of \$80,000 to Beverly Johnson should be paid in full, together with all costs of sale. Any net proceeds of the sale then remaining should be divided as follows:

(a) If the house is sold within 90 days of the date of November 22, 1991, all remaining net proceeds of sale should be awarded to defendant.

(b) If the house is sold after the expiration of 90 days from November 22, 1991, the parties should divide any net proceeds equally.

(c) In the event that the sales price of the house is not sufficient to pay the first and second mortgages and costs of sale, the parties shall be equally responsible for payment of any short fall or deficiency.

Plaintiff should continue to make the first mortgage payment until the house is sold. Payment of the second mortgage shall continue to be deferred. Defendant may remain in possession of the house until it is sold.

6. Automobiles. The court finds, based on the parties' stipulation, that the 1988 Landcruiser has a net value, after payment of the encumbrance thereon, of \$7,000. The Landcruiser shall be awarded to defendant. The court finds that the 1987 Mercedes has no equity, since it is subject to a lease agreement. Plaintiff should assume and pay the lease payments, and hold defendant harmless therefrom.

7. Individual Retirement Account. The individual retirement account in the name of Rosalind Willey should be divided as follows:

(a) The stock in American Telephone and Telegraph should be awarded to defendant since it was a family gift to her.

(b) The cash amounts in the individual retirement account should be divided equally between the parties.

8. 401K Plan. The 401K plan has a net value of approximately \$24,000, which should be divided equally between the parties. Plaintiff should repay the loan to the 401K plan and should be entitled to the benefit of any increase in the value of the 401K plan accrued as a result of the payment of the loan.

9. Furniture and Personal Property. The furniture in the parties' home should be awarded to defendant. The furniture acquired by plaintiff after the parties' separation should be awarded to him, and he should assume and pay any obligations incurred in connection therewith. In addition, plaintiff should be awarded the following personal items currently located in the parties' home:

(a) Oak chair in den;

- (b) Oak table and chairs (presently being stored);
- (c) Plaintiff's books;
- (d) Framed maps in the den;
- (e) Framed birds in the master bedroom;
- (f) Brass bird bookends;
- (g) Carved arctic loon; and
- (h) Butter churn.

Each party should be awarded the other personal property presently in his or her possession.

10. J. G. Willey Limited Partnership. Based on the stipulation of the parties, the court finds that this is a premarital asset of no value and awards it to plaintiff.

11. Pension Plan. Plaintiff currently has a pension plan with his employer, Kidder, Peabody & Company. The pension plan should be divided between the parties pursuant to the Woodward formula as of November 21, 1991, pursuant to a qualified domestic relations order.

12. Alimony. The court finds that a reasonable average income to use for plaintiff in determining alimony to be paid in this matter is \$110,000. Because of plaintiff's employment as a stock broker, his income has fluctuated. In 1987 and 1991, plaintiff had unusually good income years. The court further finds that defendant is capable of earning an income of between \$1,500 and \$2,000 per month, based on her education and qualifications. Accordingly, the court finds that it is equitable that plaintiff pay alimony to defendant of \$1,500 per month for one year from the date of trial herein, and \$1,000 per month for three years thereafter. The court further finds that plaintiff has been supporting defendant during the parties'

separation of approximately one year, and it is appropriate to take that time period into account in determining the term of alimony. Alimony shall terminate at the end of four years from the date of trial, or when defendant remarries, cohabits with a member of the opposite sex, or dies, whichever first occurs.

13. Decree of Divorce. The decree of divorce herein should be final upon January 1, 1992.

14. Deferred Compensation and Bonuses. The court finds that based on work already performed by plaintiff as an employee of Kidder, Peabody & Company, he is entitled to a bonus in January of 1992. The amount of that bonus should be divided equally between the parties. The court further finds that future bonuses, which plaintiff is entitled to be paid in 1995 and 1996, have been earned as of this time and are contingent only upon plaintiff's continued employment with Kidder, Peabody & Company. Accordingly, if plaintiff is still employed by Kidder, Peabody & Company and receives those bonuses, the amount of those bonuses should be divided equally between the parties. The court further finds that plaintiff's deferred compensation for 1991 will be used to pay ongoing expenses and should not otherwise be divided between the parties. Each party shall be responsible for the payment of taxes on the portion of the bonuses distributed to that party.

15. Claim of Premarital Contribution. Defendant asserted a claim in this matter that she made a premarital contribution to the marriage of approximately \$29,000, consisting of the equity in the home owned by her located on Logan Avenue prior to the marriage. The court finds that the funds received upon the sale of the Logan Avenue house in 1983 were commingled with other funds of the parties by their choice and have lost their separate character as premarital property.

Accordingly, the court makes no award as a result of the claimed premarital contribution.

16. Joint Tax Return. The parties shall file a joint income tax return for 1991 and divide any refunds to be received equally. In the event that taxes are due, the parties shall each pay one-half of any taxes.

17. Medical Expenses of Defendant. Defendant underwent surgery in September of 1991. The medical expenses incurred in connection with that surgery have been submitted for payment to plaintiff's health insurance provider. Any of those expenses not paid by insurance should be paid from plaintiff's Complus Plan insofar as there are sufficient funds in the plan to do so. In the event that the Complus Plan does not cover all of those medical expenses, plaintiff should be responsible for payment.

18. First Interstate Advance Line. During the marriage, plaintiff and defendant had a credit line with First Interstate Bank. The court finds that the credit line was incurred to cover family expenses. Each party should pay one-half of the amount due on the credit line as of November 21, 1991.

19. Other Debts and Obligations. Any debts and obligations incurred by the parties since their separation should be paid by the party who incurred them. The court finds that defendant is not entitled to be reimbursed for tuition incurred by her for Spring Quarter of 1991.

20. Obligation of Blake Johnson. Blake Johnson owes the parties approximately \$2,000 which he pays to them at the rate of approximately \$100 per month. Defendant should be entitled to receive the payments from Blake Johnson.

21. State Tax Refund for 1990. The state income tax refund for 1990 should be divided equally between the parties.

22. Attorneys' Fees and Costs. Plaintiff has previously paid \$1,950 toward defendant's attorney's fees and should be required to pay an additional \$3,500 toward defendant's attorney's fees. Otherwise, each party should pay his or her own costs and fees incurred herein.

From the foregoing findings of fact, the court now makes an enters the following:

Conclusions of Law

1. Each party should be awarded a decree of divorce from the other party, to become final upon January 1, 1992.

2. The real and personal property of the parties should be awarded as set forth in paragraphs 5, 6, 7, 8, 9, 10, 11, and 20 of the findings of fact herein.

3. The court should enter a qualified domestic relations order with respect to the division of the pension plan as set forth in paragraph 11 of the findings of fact herein.

4. Plaintiff should be ordered to pay alimony to defendant as set forth in paragraph 12 of the findings of fact herein.

5. Future bonuses to plaintiff through Kidder, Peabody & Company in 1992, 1995, and 1996, should be divided between the parties as set forth in paragraph 14 of the findings of fact herein. Plaintiff's deferred compensation for 1991 should be used to pay the ongoing expenses and should not otherwise be divided by the parties. Each party should be ordered to pay the taxes due on the portion of the bonuses distributed to that party.

6. Defendant is not entitled to an award of a premarital contribution in the amount of \$29,000, as set forth in paragraph 15 of the findings of fact herein.

7. The parties should file a joint income tax return for 1991 and should be ordered to divide any refunds to be received equally. The parties should each be ordered to pay one-half of any taxes.

8. Any of defendant's surgery expenses not paid by insurance should be paid from plaintiff's Complus Plan, insofar as there are sufficient funds in the plan to do so. In the event that the Complus Plan does not cover all of those medical expenses, plaintiff should be responsible for payment.

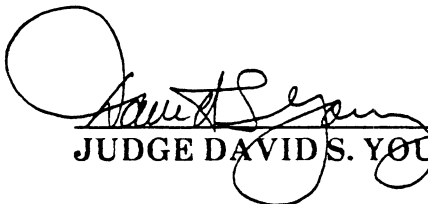
9. The parties should be ordered to pay the debts and obligations incurred during the marriage as set forth in paragraphs 18, 19, and 20.

10. The state income tax refund for 1990 should be awarded equally between the parties.

11. Plaintiff should be ordered to pay an additional \$3,500 toward defendant's attorney's fees. Otherwise, each party should be ordered to pay his or her own costs and fees incurred herein.

DATED this 4th day of January, 1992.

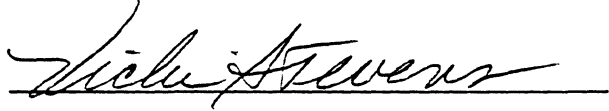
BY THE COURT:


JUDGE DAVID S. YOUNG

CERTIFICATE OF SERVICE

I hereby certify that I caused a true and correct copy of the foregoing
FINDINGS OF FACT AND CONCLUSIONS OF LAW to be delivered to the
following, this 30th day of December, 1991:

Roger D. Sandack, Esq.
500 Kearns Building
Salt Lake City, Utah 84101

A handwritten signature in cursive script, reading "Vicki Stevens", is written over a horizontal line.

JAN 14 1992

SALT LAKE COUNTY
By [Signature] Deputy Clerk

ELLEN MAYCOCK - 2131
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IN THE THIRD JUDICIAL DISTRICT COURT
FOR SALT LAKE COUNTY, STATE OF UTAH

GLEN P. WILLEY,)	
Plaintiff,)	DECREE OF DIVORCE
vs.)	2171234
ROSALIND ANN JOHNSON WILLEY,)	1-15-92-800am
Defendant.)	Civil No. 91 490 0101
)	Judge David S. Young

The above-entitled matter came on for trial on November 21 and 22, 1991. Plaintiff was present and represented by his counsel, Ellen Maycock, and defendant was present and represented by her counsel, Roger Sandack. The court having heard testimony, received exhibits, heard the arguments of counsel, and being fully advised, and having made and entered its findings of fact and conclusions of law,

NOW, THEREFORE, IT IS HEREBY ORDERED, ADJUDGED, AND DECREED:

1. Decree of Divorce. Plaintiff Glen P. Willey is hereby awarded a decree of divorce from defendant Rosalind Ann Johnson Willey, and defendant Rosalind Ann Johnson Willey is hereby awarded a decree of divorce from plaintiff Glen P. Willey,

EXHIBIT "B"

on grounds of irreconcilable differences, such decree to become final on January 1, 1992.

2. Real Property. The house and real property located at 2605 East Maywood Drive, Salt Lake City, Utah is ordered to be sold as soon as feasible. The house shall be listed at a price of \$350,000 with a new real estate agent to be agreed upon by the parties, as soon as the present listing agreement expires. Upon sale of the house, the first mortgage in the approximate amount of \$232,000 to Zions Bank is ordered to be paid in full, and the second mortgage in the approximate amount of \$80,000 to Beverly Johnson is ordered to be paid in full, together with all costs of sale. Any net proceeds of the sale then remaining are ordered to be divided as follows:

(a) If the house is sold within 90 days of the date of November 22, 1991, all remaining net proceeds of sale are awarded to defendant.

(b) If the house is sold after the expiration of 90 days from November 22, 1991, the parties are ordered to divide any net proceeds equally.

(c) In the event that the sales price of the house is not sufficient to pay the first and second mortgages and costs of sale, the parties are ordered to be equally responsible for payment of any short fall or deficiency.

Plaintiff is ordered to continue to make the first mortgage payment until the house is sold. Payment of the second mortgage shall continue to be deferred. Defendant may remain in possession of the house until it is sold.

3. Automobiles. The Landcruiser is awarded to defendant. Plaintiff is ordered to assume and pay the lease payments on the 1987 Mercedes, and hold defendant harmless therefrom.

4. Individual Retirement Account. The individual retirement account in the name of Rosalind Willey is ordered to be divided as follows:

(a) The stock in American Telephone and Telegraph is awarded to defendant since it was a family gift to her.

(b) The cash amounts in the individual retirement account are ordered to be divided equally between the parties.

5. 401K Plan. The 401K plan having a net value of approximately \$24,000 is ordered to be divided equally between the parties. Plaintiff is ordered to repay the loan to the 401K plan and is awarded the benefit of any increase in the value of the 401K plan accrued as a result of the payment of the loan.

6. Furniture and Personal Property. The furniture in the parties' home is awarded to defendant. The furniture acquired by plaintiff since the parties' separation is awarded to him, and he is ordered to assume and pay any obligations incurred in connection therewith. In addition, plaintiff is awarded the following personal items currently located in the parties' home:

- (a) Oak chair in den;
- (b) Oak table and chairs (presently being stored);
- (c) Plaintiff's books;
- (d) Framed maps in the den;
- (e) Framed birds in the master bedroom;
- (f) Brass bird bookends;
- (g) Carved arctic loon; and
- (h) Butter churn.

Each party is awarded the other personal property presently in his or her possession.

7. J. G. Willey Limited Partnership. The J. G. Willey Limited Partnership is awarded to plaintiff.

8. Pension Plan. The pension plan with Kidder, Peabody & Company is ordered to be divided between the parties pursuant to the Woodward formula as of November 21, 1991, pursuant to a qualified domestic relations order.

9. Alimony. Plaintiff is ordered to pay alimony to defendant in the amount of \$1,500 per month for one year from the date of trial herein, and \$1,000 per month for three years thereafter. Alimony shall terminate at the end of four years from the date of trial, or when defendant remarries, cohabits with a member of the opposite sex, or dies, whichever first occurs.

10. Deferred Compensation and Bonuses. The amount of the bonus plaintiff is entitled to in January of 1992 as a result of his employment with Kidder, Peabody & Company is ordered to be divided equally between the parties. Any future bonuses which plaintiff is entitled to be paid in 1995 and 1996, and which have been earned as of this time and are contingent only upon plaintiff's continued employment with Kidder, Peabody & Company, are ordered to be divided equally between the parties. Plaintiff's deferred compensation for 1991 is ordered to be used to pay ongoing expenses and shall not otherwise be divided by the parties. Each party is ordered to pay the taxes on the portion of the bonuses distributed to that party.

11. Joint Tax Return. The parties are ordered to file a joint income tax return for 1991 and divide any refunds to be received equally. In the event that taxes are due, the parties are ordered to each pay one-half of any taxes.

12. Medical Expenses of Defendant. Any medical expenses incurred by defendant in connection with her surgery in September of 1991 which have not been

paid by plaintiff's health insurance provider shall be paid from plaintiff's Complus Plan, insofar as there are sufficient funds in the plan to do so. In the event that the Complus Plan does not cover all of those medical expenses, plaintiff is ordered to be responsible for payment.

13. First Interstate Advance Line. Each party is ordered to pay one-half of the amount due on the credit line with First Interstate Bank as of November 21, 1991.

14. Other Debts and Obligations. Any debts and obligations incurred by the parties since their separation are ordered to be paid by the party who incurred them.

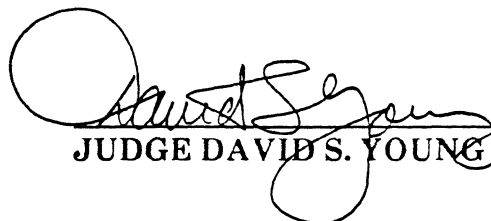
15. Obligation of Blake Johnson. Defendant is awarded the obligation from Blake Johnson of \$2,000, which he pays at the rate of approximately \$100 per month.

16. State Tax Refund for 1990. The state income tax refund for 1990 is ordered to be divided equally between the parties.

17. Attorneys' Fees and Costs. Plaintiff is ordered to pay an additional \$3,500 toward defendant's attorney's fees. Otherwise, each party is ordered to pay his or her own costs and fees incurred herein.

DATED this 14th day of January, 1992.

BY THE COURT:


JUDGE DAVID S. YOUNG